BRIEF IN SUPPORT OF PETITION.

Opinions.

The opinion of the District Court (R. 93) is reported in 36 Fed. Supp. 873, and that of the Circuit Court of Appeals (R. 112) in 121 Fed. (2d) 190.

Jurisdictions.

The jurisdiction of this Court is provided by Title 28, U. S. Code, Section 347(a).

Facts.

The facts are stated in the petition. We wish, however, to stress the following: (1) The petitioner received as its sole compensation its overhead expense; (2) it did not share in the profits or bear any of the losses resulting from the operation of the *Waukegan;* and (3) the vessel was operated for the account of the Maritime Commission (United States) by whom all of the operating expenses were paid, including the wages of the master, officers and crew. Petitioner was merely an intermediate agent and did not participate in any of the negligent acts resulting in the collision of that ship with the bridge.

Summary of Argument.

The Circuit Court of Appeals has held that an intermediate agent is liable for the tort of a subagent committed in the performance of its principal's work even if the principal is also liable. This proposition is contrary to the

decisions of this Court as set forth in *Johnson* v. *Fleet Corporation*, 280 U. S. 320, and *Standard Oil Co.* v. *Anderson*, 212 U. S. 215; is contrary to all the text writers on the subject of agency, the decisions of the various State courts and the Restatement of the Law of Agency; contrary to the opinion of Attorney General Stone rendered in 1925 (34 *Opinions of the Attorney General*, 363) dealing with a similar situation, and lacks the support of any authority.

ARGUMENT.

POINT I.

The decision of the Circuit Court of Appeals is in conflict with decisions of this Court.

The Circuit Court of Appeals held that even if the United States or the Maritime Commission as owner of the *Waukegan* were liable for the negligence of the master or crew, the petitioner was also liable. The Court said (R. 114):

> "* * * But, assuming that there is such a similarity and that either the United States or the Maritime Commission is liable to appellee, it does not follow that appellant is exculpated. That a principal is liable for a wrong does not necessarily immunize his agent. (Citations.) The books are full of instances where dual liabilities are not alternatives or mutually exclusive; a plaintiff may be lucky enough to have a two-stringed bow. It is irrelevant, here, whether, at common law or by statute, appellee has a cause of action against the United States or the Commission, or whether appellant may be liable to the United States or the Commission for whatever amounts either of them may be obligated to pay appellee. Common sense and the precedents make

> appellant liable on the facts of this case. * * * We think our opinion in *United States Shipping Board Emergency Corp.* v. *Greenwald,* 16 Fed. 2(d) 948, which held a Managing Agent with similar powers liable for the death of a seaman, is applicable here, although in that case the Managing Agent had an interest in the profits. * * *"

In the *Greenwald* case, referred to by the Circuit Court of Appeals, the Court said (951):

> "* * * Bull & Co. managed and operated the vessel on a 'cost plus' plan and received a percentage of the profits. It is conceded in the record that the decedent was employed by the Shipping Board and under these circumstances Bull & Co. are deemed owners *pro hac vice* with all liabilities ordinarily attaching against a true owner. * * *"

In basing its decision on the *Greenwald* case, the Circuit Court of Appeals is in conflict with its own decision in *The Elkton,* 86 Fed. (2d) 201. In the latter case a managing agent of Shipping Board vessels had successfully defended himself against suits growing out of the operation of such vessels and sued the United States for reimbursement for expenses so incurred. In holding the managing agent entitled to reimbursement under ordinary principles of agency, the Court said:

> "* * * We find it difficult to see how this contract can be construed as creating anything but a straight agency for operating the Board's ship. * * * It chose, not to charter its ships to the company, but to put them in trade on its own account; * * *"

In the *Greenwald* case the Court held that the managing agent was an owner *pro hac vice.* In the *Elkton* case the same Court, dealing with a similar contract, said the man-

aging agent was not an owner *pro hac vice* or an independent contractor but a mere agent. In this case the Court while holding the petitioner a mere agent, imposed upon it the liabilities of an owner *pro hac vice* or an independent contractor contrary to the decision in the *Elkton* case.

So far as the *Greenwald* case can be any support to the decision of the Circuit Court of Appeals, it was overruled by this Court in *Johnson* v. *Fleet Corporation,* 280 U. S. 320, 74 L. Ed. 451. The Court had before it then a group of cases arising out of the operation of ships by the United States through managing agents. A number of suits had been brought as this one was, at law against the Fleet Corporation and against the managing agents. They were all dismissed on the ground that there was a remedy against the United States for all the causes of action under the Suits in Admiralty Act (U. S. Code, Annot., Title 46, §748) and that remedy was exclusive of all others. This Court there stated:

> "The analysis of the act and the reasons on which rests our decision in United States Shipping Bd. Emergency Fleet Corp. *v.* Rosenberg Bros. & Co. apply here. Putting the United States and the Fleet Corporation on the same footing and providing remedies to be exclusive in admiralty would not serve substantially to establish uniformity if suits under the Tucker Act and in the court of claims be allowed against the United States and actions at law in state and federal courts be permitted against the Fleet Corporation or other agents for enforcement of the maritime causes of action covered by the act. Such a failure of purpose on the part of the Congress is not readily to be inferred. *We conclude that the remedies given by the act are exclusive in all cases where a libel might be filed under it.* * * *" (Italics ours.)

This Court clearly denied a right to recover both against the United States and the managing agent and decisively disposed of the *Greenwald* case as any authority for any such dual liability.

This Court also laid down in *Standard Oil Company* v. *Anderson,* 212 U. S. 215, the rule applicable to this situation. There the plaintiff, employed as a longshoreman, was injured through the negligent operation of a winch. All the work of loading was done by employees of the stevedore except the operation of the winch. That was done by a winchman in the general employ of the Standard Oil Company, the owner of the vessel. In determining the question of liability the Court first determined whether the winchman was the agent of the stevedore or of the shipowner and the determination of this question was decisive of the question of liability. Mr. Justice Moody said:

> "It sometimes happens that one wishes a certain work to be done for his benefit, and neither has persons in his employ who can do it nor is willing to take such persons into his general service. He may then enter into an agreement with another. If that other furnishes him with men to do the work, and places them under his exclusive control in the performance of it, those men become *pro hac vice* the servants of him to whom they are furnished. But, on the other hand, one may prefer to enter into an agreement with another that that other, for a consideration, shall himself perform the work through servants of his own selection, retaining the direction and control of them. In the first case, he to whom the workmen are furnished is responsible for their negligence in the conduct of the work, because the work is his work, and they are, for the time, his workmen. In the second case, he who agrees to furnish the completed work through servants over whom he retains control is responsible for their neg-

> ligence in the conduct of it, because, though it is done for the ultimate benefit of the other, it is still, in its doing, his own work."

The test there laid down by this Court is: Whose work is being done? In this case the work of operating the *Waukegan* was that of the Maritime Commission. Petitioner was not in any sense an independent contractor or an owner *pro hac vice*. The master and officers were selected and paid by the Maritime Commission and the vessel was operated for the account of the Commission. Petitioner as an intermediate agent with limited authority under the direction and control of the Maritime Commission should not be held liable for the negligence of the *Waukegan's* crew.

POINT II.

The decision of the Court of Appeals in this case is in direct conflict with universally established principles of the law of agency.

Both a principal and an agent are liable for the negligence of the agent, but it is the universal rule of local law that both cannot be liable on the doctrine of *respondeat superior* for negligence in which neither participated. If the so-called agent is really an independent contractor, he is liable; if merely an intermediate agent of the principal, he is not liable.

In Story on Agency, 9th Edition, Section 313, at pages 385-6, it is said:

> "But no action will ordinarily lie against an agent for the misfeasance or for the negligence of those whom he has retained for the service of his principal by his consent or authority, any more than

it will lie against a servant who hires laborers for his master at his request for their acts; unless indeed in either case, the particular acts which occasion the damage are done by the orders or directions of such servant or agent. The action under other circumstances must be brought either against the principal or against the immediate actors in the wrong."

In Tiffany on Agency, page 385, it is said:

"An agent is not as a rule liable to third persons for loss or injury caused by the wrongful act or omission of a subagent or coagent unless he authorized or participated therein."

Floyd R. Mechem, Law of Agency, Second Edition, in §332 (pp. 244-5-6) it is said:

"For the torts of such subagent to third persons the agent would not be liable merely by virtue of his relation but the principal would be liable as for the torts of any agent.

"Where the general manager and train despatcher properly employed a watchman to keep strikers from the right of way of a railway and the watchman in the course of his employment made an improper assault upon the plaintiff, it was held that the watchman and the railway company were liable to the plaintiff but that the general manager and train despatcher were not. (Citing Canfield *v.* C. R. I. & P. Ry. Co., 59 Mo. App. 354)."

In 3 Corpus Juris Secundum, at page 322, it is stated:

"An agent is not, in general, liable to third persons for the misfeasance or malfeasance of a subagent employed in the service of his principal, unless he is guilty of fraud or gross negligence in the appointment of such subagent or improperly cooperates in the latter's acts or omissions."

The decisions of the courts of the various States are all in accord that an intermediate agent is not liable for the torts of a person employed by him for its principal who at the time of committing the tort is doing the principal's work where there is no participation in the tort by the intermediate agent.

Bath v. *Caton,* 37 Mich. 199. This was an action for trespass upon land and cutting and removal of timber. The Sinclair Mining Company was engaged in mining operations and was cutting timber from its own land. This work was under the general supervision of Bath, who employed a surface captain and other workmen who worked under his general direction. He directed the surface captain to cut and get out wood and timber, meaning that it should be cut only from the Company's land, and believed the surface captain, who had been long in the employ of the Company, knew where the boundary line was. In carrying out these orders the surface captain and men working under him went across the boundary line and cut timber on Caton's land. The Court held that Bath could not be held liable for trespass under the doctrine of *respondeat superior,* saying (202):

> "* * * It is not enough in such a case that there exists the relation of superior and subordinate. There must be something more. The relation must be such that the subordinate is the servant or agent of the superior in the particular course of business or sphere of action in which the wrong is done. Such was not the case here. In short the requisite conditions to authorize the application of the doctrine of *respondeat superior* against Bath were not present. To apply it against him would imply that the company could not be held liable, a position which cannot be admitted."

Brown v. *Lent,* 20 Vermont 529, 533. One Barker contracted with the Vermont Central Railroad Company to do certain stone and masonry work and had acquired the right to quarry stone from a certain ledge. Barker employed the defendant as his general agent to superintend all the work under his contract. Defendant gave to one Morris, who had special charge of the blasting, general directions in respect to the work at that particular place. Morris gave directions relative to a blast by which plaintiff's daughter was injured. The Trial Court instructed the jury that if they believed the defendant was the general superintendent of the work under Barker and had the same power that Barker had to control and direct the manner in which the blasting was done, he would be liable. The Supreme Court in reversing said:

> "* * * neither principle nor authority will warrant the holding a mere middle man, an intermediate agent between the master and the direct agent, constructively responsible for the acts of the latter."

Smith v. *Rutledge,* 332 Illinois 150, 163 N. E. 544. The plaintiff recovered a judgment against one Rutledge ,the owner of an apartment building, and against the Illinois State Trust Company, the managing agent. A fire resulted from the negligence of the janitor in the operation of an oil burner. The burner was in charge of the janitor who had been hired by the owner, but who was paid by the Trust Company out of funds it collected. In holding the Trust Company not liable for the negligence of the janitor, the Court said:

> "* * * An agent is not, in general, liable to third persons for the misfeasance or malfeasance of subagents employed by him in the service of his principal unless he is guilty of fraud or gross negligence

in the appointment of such sub-agents or improperly cooperates in the latter's acts or omissions (2 *Corpus Juris*, p. 829). Neither is he liable for the negligence of other agents of his principal with which he had nothing to do."

Wahlheimer v. *Hardenbergh*, 217 N. Y. 264. An action for libel was brought against the General Manager and Secretary of the New York City News Association for libelous articles distributed by his subordinates in the association. The defendant did not participate in the distribution of the libelous matter. Judge Cardozo said (266):

> "The trial judge left it to the jury to say whether the defendant was the real principal in the business. If he was the principal, if the business, regardless of the name under which it was conducted, was in fact his, then, of course, the reporters were his servants, and he was responsible for the libel. But we find no evidence that he ever was the principal. He was not even a member of the association. He was employed by the executive committee; he was paid a salary for his services; and he held his position at the pleasure and subject to the direction of his employers. Undoubtedly, he had large duties of supervision and large powers of control. But the business was not his; the reporters were not his servants; he was not the principal, but the manager.
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> "We hold, then, that there is nothing in this record to justify the conclusion that the defendant was the principal. That, however, is the one theory on which the case went to the jury. But if other theories of liability were to be considered, they would be found to be equally untenable. On the subject it is impossible to add anything to what was so well said by Mr. Justice CLARKE in his dissenting opinion at the Appellate Division. The defendant, if he

was not the principal, cannot be held on the theory of respondeat superior."

The universality of the rule that an intermediate agent is not liable for the torts of a sub-agent in which he did not participate is shown in the American Law Institute's Restatement of the Law of Agency.

Section 79, Comment:

"a. Whether or not the agent is authorized to employ agents of the principal depends upon the manifestations of the principal in light of the circumstances, including the usages of the business and of the parties inter se. The agents so employed are the agents of the principal and not of the employing agent, who is not responsible to them for their compensation unless he so manifests, and is no more responsible for their conduct to third persons or to the principal than he is for the conduct of other agents of the principal, unless he is negligent in their selection. (See Secs. 358, 405)."

Section 344, Comment:

"a. The liability of the agent for conduct which he directs is the same as that of the principal, and the Comment on Sec. 212, dealing with the liability of the principal, applies. The agent is not liable for the tortious conduct of other persons in the principal's employ merely because they are subject to the agent's orders. (See Sec. 358) If, however, he directs them to act, intending an act or a consequence which would otherwise be tortious, the fact that his directions are those commanded by the principal does not give him immunity from liability."

"Illustrations:

"1. A, foreman of a gang of track workers, directs some of the workers to obtain wood from

a specified field which belongs to T. A is subject to liability to T for the trespass.

"2. Same facts as in Illustration 1, except that A tells the man to enter a field belonging to the railroad. By mistake they enter T's field. A is not thereby liable to the plaintiff."

"Section 358:

"(1) The agent of a disclosed or partially disclosed principal is not subject to liability for the conduct of other agents unless he assists them in the performance of a tortious act or directs or permits them to commit it."

"Illustration:

"1. A is employed by P as general manager. B, a servant under the immediate direction of A, is negligent in the management of a machine, thereby injurying T, a business visitor. A is not liable to T."

In the *West Hixton*, 1927 A. M. C. 1781, suit was brought against the managing agent for damages resulting from a collision due to the negligence of the master. The vessel was operated for the account of the United States under a managing agency agreement. The Court held:

"* * * On the 15th day of April, 1920, the plaintiff was the owner of a motorboat named *Thais*, which was moored at a wharf or dock known as the First Street dock, in and upon the waters of Los Angeles harbor. On the morning of that day appellant was operating and had the exclusive control and management of the freight steamer *West Hixton*, which was then being operated, managed, and directed by appellant, and was under the command of Lewis C. Drewson, captain of said vessel. The *West Hixton* was proceeding under the direct command of Drewson down channel to said First Street

wharf or dock under and by virtue of orders so to do issued to Captain Drewson by the port captain of appellant. Drewson was employed as captain of said vessel by appellant, and his salary as such captain was paid by appellant. But in its operation of the *West Hixton*, and in its employment of Drewson, appellant claims that it was acting only as agent of the owner, out of whose funds Drewson's wages were paid."

and at 1785:

"• • • We are of the opinion that, in employing Drewson, appellant was acting solely as agent of the owner of the ship, and that Drewson was the employee of the owner and not of the agent. Conceding that, as respondent contends, the employee was under the control and subject to the orders of appellant, yet that control was merely control by the principal through the agent. The negligence did not occur by reason of appellant's direction to Drewson to move the ship to a certain place. It was negligence by the captain, consisting of carelessness in his manner of operation of the ship while executing the order. Under these circumstances the negligence must be attributed, not to the agent who gave the order under which the ship was being moved, but to the owner whose employee was guilty of that negligence."

POINT III.

The decision of the Circuit Court of Appeals is contrary to the decision of Attorney General Stone rendered in 1925.

Attorney General Stone rendered an opinion in 1925 (34 Opinions of the Attorney General 363) on the relationship between the managing agent, the master and crew and

the United States Shipping Board in cases of vessels operated under agreements similar to that here involved. Attorney General Stone quotes the General Counsel of the Shipping Board as stating:

> "'Our view has always been that the masters and crews of Shipping Board vessels are agents and servants of the United States. The vessels are owned by the Government. The Fleet Corporation acting as agent for the United States appoints the managing agents, who in turn select the crew. They do so subject to the rules and regulations issued by the owner. The masters and crews become the agents and servants of the owner, the United States, and not of the intermediary agents, the Fleet Corporation and the managing agents. The latter do only what they are authorized and directed to do in employing the masters and crews.'"

and then he goes on to state:

> "The present form of contract, as a whole, makes clear the relation of principal and agent between the United States and the agent, with only limited authority in the agent. It is in no sense a charter or a lease of the vessels. The agent cannot be held as an insurer of the safety of the men employed for the account of the United States unless the principle of the Compensation Law is to be ignored and its remedial purpose defeated."

The Attorney General there was determining that the managing agent was not liable for injuries suffered by members of the crews of vessels operated under the agreements therein described and that the United States was. There is no indication or intimation in his opinion that there was a dual liability, because he stated:

> "• • • The agent cannot be held as insurer of the safety of the men employed for the account of the United States.• • • "

This opinion of the Attorney General has been relied upon by those who dealt with the Shipping Board and the Maritime Commission in making contracts as constituting the principle of law to be applied to their construction and to the determination of the relationship between the parties. The Circuit Court of Appeal's decision is contrary to that opinion and will disturb the relationship between the United States and the operators of its merchant ships.

If a managing agent is liable for damages caused by the negligence of a master of a government owned vessel, it would be liable in all collision cases where the master or other officers of the vessel were negligent. In all the cases involving such collisions litigated in every maritime circuit there is not one which has held the managing agent liable.

In *The Suwied* (*N. Y. & Cuba Mail S. S. Co.* v. *United States*), 12 Fed. (2d) 348, Judge Hough stated:

> "It has not been claimed by the United States, and is vehemently denied by the Steamship Company, that this agency agreement makes it responsible for the careless navigation of navigators by it selected, and it is indeed a serious matter to hold responsible for the navigation of a vessel the agent who procured the navigators. • • • "

While we have not actual cases where the liability of the managing agent for the negligence of the master has been considered, it has been involved in collision cases on innumerable occasions. The fact that it has not been determined is a clear indication that the parties were all of the opinion that there was no such liability, relying upon well-established principles of agency. This universal principle

of agency established by the State courts and as set forth by text writers is set aside and ignored by the decision of the Circuit Court of Appeals.

POINT IV.

Conclusion.

It is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

ARTHUR M. BOAL,
Counsel for Petitioner.